No. 86-1888

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROSE MARTINELLI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EUGENE LENNY MARTINELLI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner alleges that her son died as a result of injuries he received incident to his service in the United States Army Reserve. She contends that the United States is liable in damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite the rule of *Feres* v. *United States*, 340 U.S. 135 (1950), because her son was a reservist and died at home.

1. Petitioner is the mother and administratrix of Eugene Lenny Martinelli, who, as an Army reservist, participated in routine gas chamber exercises at Camp Dawson, West Virginia, on October 9, 1983, designed to test his ability to put on a gas mask quickly. During the standard exercises Martinelli was placed in a gas chamber and, after he put on a gas mask, the gas chamber was activated. Petitioner alleges that during the exercises her son was exposed to noxious gases, resulting in his death at home three days later. The United States moved to dismiss

the complaint for failure to state a claim, asserting that, under *Feres,* petitioner's suit is barred as a matter of law because he was injured incident to military service.

The district court dismissed the complaint (Pet. App. 26-31). It noted that, under *Feres,* "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service" (*id.* at 28). Citing a number of court of appeals decisions, the court added that "there is no doubt that the *Feres* doctrine also applies to reservists" (*ibid.*). The court further noted that "[p]laintiffs are frivolously attempting to make the actual time of death an issue" (*id.* at 29). It concluded that since the complaint alleged that Martinelli's death arose out of activities incident to military service, "[i]t makes no difference whether his death occurred simultaneously with his injuries or several days thereafter" (*id.* at 29-30).

The court of appeals affirmed (Pet. App. 20-25). It held, "in accord with * * * several other courts of appeals," that "the *Feres* doctrine bars FTCA suits by or on behalf of persons serving in the United States Military Reserves because the same rationale that precludes suits by or on behalf of servicepersons is equally applicable to reservists" (*id.* at 23). The court of appeals first observed that under the Veterans' Benefits Act, 38 U.S.C. 101 *et seq.*, "reserve duty is expressly encompassed within 'inactive duty training', 38 U.S.C. § 101(23), and the statutory definition of veteran includes one who became disabled or died during a period of 'inactive duty training' " (Pet. App. 22 (citing 38 U.S.C. 101(2), (24)); therefore reservists injured incident to service are entitled to veterans' benefits.[1] The court of appeals next stated that FTCA

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[1] Petitioner states (Pet. 13-14) that she has received no veterans' benefits. She also appended to her petition a letter from the Army denying a claim for more than $200,000 (Pet. App. 33-34). It should be noted that that letter is not a denial of an application for veterans' benefits. Petitioner does not state whether she has applied for

suits for service-connected injuries are barred "because of 'their effect on the willingness of military personnel to follow directions of their superiors' and because '[m]ilitary decisionmakers might not be willing to act as quickly and forcefully as is necessary . . . if they know they will subsequently be called into a civilian court to answer for their action' " (Pet. App. 23, quoting *Jaffee* v. *United States*, 663 F.2d 1226, 1232 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982)). The court of appeals concluded that suits by reservists "for injuries received while on reserve training in military exercises would have the same consequences" (Pet. App. 23).[2]

The court of appeals found "no error in the district court's rejection of appellant's argument that because her son did not die until three days after the completion of the military exercise, *Feres* does not apply" (Pet. App. 24 n.1).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

Petitioner primarily contends (Pet. 9-10) that the Court should grant review in this case to consider whether military reservists come within the ambit of the *Feres* doctrine. However, there is plainly no warrant for review by this Court. The court of appeals' holding—that the *Feres* doctrine bars FTCA suits by or on behalf of military reservists because the same rationale that precludes suits by

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veterans' benefits; of course, a person must apply in order to obtain benefits (38 U.S.C. 3001(a)).

[2] The court also rejected petitioner's argument that courts should engage in a case-by-case review to determine whether the particular suit would undermine military discipline and effectiveness, instead holding that "*Feres* is a *per se* bar of damage actions against the United States and military officers arising out of injuries to military personnel" (Pet. App. 24).

or on behalf of servicemembers is equally applicable to reservists—is in accordance with settled law. All the courts of appeals that have considered the question have concluded that *Feres* applies to reservists. See, *e.g.*, *Mattos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam); *United States* v. *Carroll*, 369 F.2d 618, 620 (8th Cir. 1966); *Layne* v. *United States*, 295 F.2d 433, 434-436 (7th Cir. 1961). Moreover, those decisions are plainly correct, as there is no meaningful difference between a reservist injured incident to military service and a servicemember so injured.[3]

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[3] Petitioner suggests (Pet. 15), relying on *Stanley* v. *United States*, 786 F.2d 1490 (11th Cir. 1986), rev'd, No. 86-393 (June 25, 1987), that a case-by-case analysis is appropriate to determine whether proceeding with this case would undermine military discipline and effectiveness. While the Court reversed the Eleventh Circuit's decision in *Stanley* without addressing its case-by-case methodology, it is clear from the Court's recent decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), that no such analysis is warranted.

The Eleventh Circuit concluded in its decision in *Johnson* that a case-by-case inquiry was required where a servicemember was injured as the result of negligence on the part of a civilian federal employee; the Eleventh Circuit subsequently extended its case-by-case approach to all *Feres* cases in *Stanley*. In reversing in *Johnson*, this Court engaged in no inquiry as to whether the suit at issue would undermine military discipline and effectiveness, but instead concluded that suits brought by servicemembers injured incident to service "are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness' " (slip op. 9, quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985) (emphasis in *Shearer*)). The Court "reaffirm[ed] the holding of *Feres* that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service' " (slip op. 10, quoting *Feres*, 340 U.S. at 146). It thus rejected the case-by-case approach.

Petitioner also suggests (Pet. 14) that the rule of *Feres* should be applied differently where, as here, suit is brought by a representative of a servicemember rather than by a servicemember. The Court disposed of such a claim in *Shearer* by noting that "[i]t is immaterial that this suit was brought by a representative of the serviceman; indeed, *Feres* itself was brought by an executrix" (473 U.S. at 58 n.3).

Petitioner also asserts (Pet. 11-13) that the Court should grant certiorari to consider whether *Feres* bars this suit because Martinelli "returned from weekend exercises with no apparent injury as a result therefrom until his death three (3) days later." In support of this contention, petitioner argues that this case is governed by *United States* v. *Brown*, 348 U.S. 110, 112 (1954), where the Court held that a veteran's FTCA suit for an injury which was sustained *after* he was discharged from military service was not barred by *Feres*. *Brown* is plainly inapposite because petitioner does not dispute that her son's injury occurred "while [he was] under military control and supervision" (Pet. 12-13). If petitioner's allegation that Martinelli's death resulted from his participation in the gas chamber exercises at Camp Dawson is true, Martinelli's injury occurred incident to military service, regardless of when it became manifest. Thus, as the district court stated (Pet. App. 29), petitioner's contention that this case is not barred by *Feres* because Martinelli died at home is frivolous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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